

SERVICE DATE – NOVEMBER 19, 2013

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. FD 35582

RAIL-TERM CORP.—PETITION FOR DECLARATORY ORDER

Digest:<sup>1</sup> In this decision, the Surface Transportation Board responds to a referred question from the United States Court of Appeals for the District of Columbia Circuit, asking whether Rail-Term Corporation is a rail carrier within the definition at 49 U.S.C. § 10102(5). This question is relevant to the court’s review of decisions of the Railroad Retirement Board (RRB) finding that Rail-Term is a covered employer under rail employee-benefits acts that the RRB administers, entitling its employees to those benefits. The record here shows that several short line railroads have outsourced to Rail-Term the dispatch function of their freight rail service. The Board determines that Rail-Term is a rail carrier under 49 U.S.C. § 10102(5), and that its dispatching services are subject to the Board’s jurisdiction.

Decided: November 15, 2013

Rail-Term Corp. (Rail-Term) has filed a petition for an order declaring that it is not a “rail carrier,” as defined in the Interstate Commerce Act at 49 U.S.C. § 10102(5), as revised by the ICC Termination Act of 1995 (ICCTA), and therefore is not subject to the Surface Transportation Board’s (Board or STB) jurisdiction. Rail-Term’s petition with the STB arises from an order of the United States Court of Appeals for the District of Columbia Circuit (the D.C. Circuit or the court) issued in connection with two decisions of the Railroad Retirement Board (RRB) that ruled on coverage of Rail-Term’s employees under the Railroad Retirement Act (45 U.S.C. §§ 231-231v) (RRA) and the Railroad Unemployment Insurance Act (45 U.S.C. §§ 351-69) (RUIA).<sup>2</sup> In those decisions, the RRB held in part that Rail-Term is a rail carrier under ICCTA because it provides outsourced dispatching services that rail carriers historically have performed in house, and that its dispatchers “have the ultimate control over the movement of the trains of its rail carrier customers.” Rail-Term appealed those decisions to the D.C. Circuit. The D.C. Circuit held Rail-Term’s petition for judicial review in abeyance in order to

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<sup>1</sup> The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

<sup>2</sup> Employer Status Determination–Rail-Term Corp., B.C.D. 10-33 (Apr. 6, 2010) (RRB 10-33), reconsideration denied, B.C.D. 11-14 (Jan. 28, 2011) (RRB 11-14).

allow this agency to rule on the question of Rail-Term's "rail carrier" status under ICCTA.<sup>3</sup> The RRB and the American Train Dispatchers Association (ATDA) filed replies in opposition to the petition. We instituted a declaratory order proceeding under 49 U.S.C. § 721(a) to determine whether Rail-Term is a rail carrier under § 10102(5) and directed Rail-Term and ATDA to supplement the record by filing the pleadings, briefs, and other materials that constitute the record in the court case.

We find here that, by performing an essential rail function on behalf of several short line railroads, Rail-Term has become a rail carrier under § 10102(5). Although Rail-Term does not directly hold itself out to the public as providing interstate rail transportation services, the dispatching services that it provides under contract with carriers are an essential part of the total rail common carrier services offered by its clients to the public. The overall scheme of regulation under ICCTA indicates that Congress intended for the regulation of these kinds of contracted dispatching services to rest within our jurisdiction and, consequently, for the railroad labor laws to apply to those employees who are performing these essential rail transportation services.

### **BACKGROUND**

The railroad industry is regulated by a variety of federal laws. The Interstate Commerce Act, as more recently amended by ICCTA, created the Nation's first independent regulatory agency and grants this agency broad authority over matters relating to the regulatory oversight of rail common carriers and the transportation they provide as part of the interstate rail network. 49 U.S.C. § 10501. The comprehensive scheme of federal regulation under ICCTA embraces licensing of entry and exit and mergers and acquisitions, as well as regulation of rates and practices. Federal preemption shields those railroad operations that are subject to the Board's jurisdiction from application of state and local regulation that would unreasonably interfere with interstate railroad operations. 49 U.S.C. § 10501(b).

Other federal laws also govern the railroad industry. The United States Department of Transportation (DOT), acting primarily through the Federal Railroad Administration, has a broad grant of jurisdiction over rail carriers to ensure the safe transportation of freight and passengers. 49 U.S.C. §§ 20101-21311. The Hours of Service Act (HSA), 49 U.S.C. §§ 21101-08, for example, places limitations on the duty hours of train employees, signal employees, and dispatching service employees. The Federal Employers' Liability Act (FELA), 45 U.S.C. § 51, also provides federal protection to "any employee of a carrier" who is injured on the job due to the negligence of the carrier. The Railway Labor Act (RLA), 45 U.S.C. §§ 151-188, governs labor relations in the railroad and airline industries. And the RRA, the RUIA, and the Railroad

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<sup>3</sup> Rail-Term Corp. v. R.R. Ret. Bd., No. 11-1093 (D.C. Cir. Nov. 14, 2011). The court's order and accompanying court memorandum may be found in the record of this proceeding at Exhibit A to Rail-Term's petition. An alternative holding made by the RRB concerning Rail-Term's employees' status as employees of Rail-Term's railroad customers was not reached by the court at that time, but was expressly deferred until after this agency's ruling on Rail-Term's carrier status under ICCTA. Id., Memorandum at 3.

Retirement Tax Act (RRTA), 26 U.S.C. §§ 3201-3241, provide employees of rail carriers a separate retirement, disability and unemployment system, administered primarily by the RRB, that provides them greater benefits but require employers and employees to pay higher taxes than under the Social Security system.

This case has come before this agency in connection with the RRB's decisions because the RRA and RUIA provide alternative avenues for coverage of employees under those laws. The RRA, under 45 U.S.C. § 231(a)(1)(i), provides for coverage if an employer is a "carrier by railroad . . . subject to STB jurisdiction under 49 U.S.C. 10102(5)." The RRA also applies, pursuant to § 231(a)(1)(ii), to certain other companies that provide rail-related services and are controlled by or under common control with the carrier. The specific language of 45 U.S.C. § 231 reads in relevant part:

For the purposes of this subchapter—

(a)(1) The term "employer" shall include—

(i) any carrier by railroad subject to the jurisdiction of the Surface Transportation Board under part A of subtitle IV of title 49;

(ii) any company which is directly or indirectly owned or controlled by, or under common control with, one or more employers as defined in paragraph (i) of this subdivision, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.

Coverage under the RUIA contains parallel language at 45 U.S.C. § 351(a) & (b) for definitions of "employer" and coverage of employees under the RUIA program. Thus, under both of these laws, one basis for coverage of an employee involves whether the entity employing the workers is a "carrier by railroad" subject to our jurisdiction under ICCTA.

The legal and factual analyses both before the RRB and this agency involving the definition of the term rail carrier and the scope of employer coverage under railroad retirement and similar laws are developed from a substantial body of prior determinations, including, as discussed in detail below, matters relating to dispatching.<sup>4</sup> The question referred by the court here, however, presents a case of first impression for this agency in terms of the specific dispatching arrangement provided by Rail-Term.

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<sup>4</sup> As shown below, precedent on coverage as it relates to common carriers, rail carriers, or carrier employees, under these different laws has in many instances involved deriving definitions under one statute from a different statute with similar language.

The essential facts of this case are not in dispute. Rail-Term is a small, privately owned company that provides dispatching services to short-line railroads, primarily carriers affiliated with the Vermont Railway and the Buffalo & Pittsburgh Railroad, Inc. Rail-Term's owners do not have a controlling interest in any of its client rail carriers, and there are no officer or director relationships between Rail-Term and any of its client rail carriers. Rail-Term owns its own dispatching computer software system and provides dispatching services to its clients from its dispatching office in Rutland, Vermont. Rail-Term itself does not possess track, trains, conductors, signalmen, engineers or maintenance of way employees. Nor does Rail-Term directly offer to transport freight by rail for the public. Rather, the physical movement of freight is performed by Rail-Term's clients, many of whom are licensed rail carriers subject to STB jurisdiction, and who hold themselves out as the direct providers of the interstate transportation. At the same time, Rail-Term's central business function is to provide dispatching service as an operational arm of the client carriers on an outsourced basis (with some related computer software development), and thus the rail service provided for the rail carrier's customers is its core business. Similarly, the carriers who are Rail-Term's customers initiate the outsourcing for the core purpose of substituting it for in-house dispatching, which must be provided one way or the other in order for physical common carrier transportation operations of the carriers' systems to occur.

Operationally, Rail-Term's client railroads submit their daily train schedules and intra-day changes to Rail-Term's Director of Operations (a Rail-Term employee located in Rutland), who then gives general directions to the dispatchers employed by Rail-Term.<sup>5</sup> Those dispatchers, in turn, give the operating personnel of the client railroads authority to occupy track. Rail-Term states that its employees do not report directly to any carrier supervisor, but rather to supervisors within Rail-Term. Nor, according to Rail-Term, do the employees of the carriers report directly to any supervisors at Rail-Term.

As Rail-Term acknowledges, the dispatching services that it performs are those that rail carriers historically have performed in-house,<sup>6</sup> but Rail-Term indicated in its pleadings to the RRB that dispatching requires a level of expertise and that for some short lines and other carriers, outsourcing of dispatching might be more efficient. Rail-Term described this trend toward decoupling on-site presence of essential rail functions:

The widespread use of consultants and contractors in the railroad industry is a comparatively new phenomenon. While railroads have frequently and historically used

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<sup>5</sup> On its website, Rail-Term describes itself as "specialists in outsourced rail operations." Regarding its dispatching services, Rail-Term advertises that it "provides safe and efficient rail dispatch services to 14 railways with over 4500 miles of track throughout the United States and Canada." The company further states that "[o]ur in-house, state-of-the-art Rail Traffic Control system, with built-in flexibility, is customized to enable us to dispatch each client using their own specific set of operating rules. Our system is also available through licensing if you wish to perform your own train dispatching." RailTerm, Rail Dispatch Services, <http://www.railterm.com/rail-dispatch-services.php> (last visited Oct. 23, 2013).

<sup>6</sup> See Pet. for Decl. Order at 3-4.

nonemployee contractors to provide various types of services, the current trend toward using contractors is so different as to present the [Railroad Retirement] Board with a major new coverage issue. This development is due in part to the fairly recent growth of short line and regional railroads and due in part to the tremendous need for highly trained personnel providing technical services. In many cases short line and regional railroads cannot afford to have on their payroll as a full or even part-time employee the many types of specialized expertise required for a technologically sophisticated railroad. Furthermore, short line and regional railroad personnel whose responsibilities include dispatching, signaling, computers, and telephone equipment lack the sophistication and knowledge of third party experts such as those provided by Rail-Term.<sup>7</sup>

In short, while the final physical act of interstate rail transportation is performed by Rail-Term's clients, Rail-Term employees, by the company's own words, provide an indispensable link in implementing the key function "required" each time one of the carriers moves its cars.<sup>8</sup>

Based on these facts, the RRB found that Rail-Term is a covered employer under the RRA and RUIA. As set out above, under these laws, a covered employer includes (a) any carrier by railroad subject to our jurisdiction, and (b) a company that is directly or indirectly controlled by a carrier and is providing service in connection with the transportation of passengers or freight by the railroad.<sup>9</sup> The RRB did not find that Rail-Term is a covered employer because it is directly or indirectly controlled by its client carriers.<sup>10</sup> Instead, the RRB found Rail-Term to be a covered employer because it is a carrier subject to our jurisdiction under ICCTA.

The RRB reasoned that Rail-Term must be a rail carrier because dispatching has traditionally been performed by employees of individual railroads, and, even if dispatching today may be performed by a separate entity like Rail-Term, the work is essentially the same.<sup>11</sup> The majority noted that, without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers.<sup>12</sup> Therefore, the majority concluded that because the work of the dispatcher is an integral part of the operation of a common carrier, Rail-Term is a rail carrier under RRA and RUIA.<sup>13</sup> In the context of Rail-Term specifically, the RRB explained:

While Rail-Term and its customers do not use the train order method of operation, Rail-Term's computerized dispatching software achieves the same goal of directing the

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<sup>7</sup> April 20, 2007 letter from Counsel for Rail-Term to the RRB, attachment to Rail-Term's March 27, 2012 submittal to supplement the record, at 22-23 (pdf pp. 18-19).

<sup>8</sup> See Pet. for Decl. Order at 3-4.

<sup>9</sup> See RRA, 45 U.S.C. § 231(a)(i) & (ii); RUIA, 45 U.S.C. § 351(a) & (b).

<sup>10</sup> B.C.D. 10-33 at 3.

<sup>11</sup> Id. at 6.

<sup>12</sup> Id. at 4.

<sup>13</sup> Id. at 6-7.

movement of trains and engines over the track of Rail-Term's customers. Until properly dispatched, the engineer cannot begin movement of the train. Because of the control that dispatchers have over the motion of trains, dispatching is an inextricable part of the actual motion of trains and thereby is an inextricable part of fulfilling the railroad's common carrier obligation.<sup>14</sup>

In other words, the RRB found that Rail-Term is a rail carrier and thus a “covered employer” under the RRA and RUIA because it provides outsourced dispatching services, a critical function to providing rail transportation that rail carriers historically have performed in house, and because Rail-Term’s dispatchers have the ultimate control over the movement of the trains of its rail carrier customers.<sup>15</sup>

The RRB denied reconsideration in B.C.D. 11-14. The majority reaffirmed that it viewed train dispatching services as an inextricable part of a rail carrier fulfilling its common carrier obligation.<sup>16</sup> The RRB also relied on its prior decisions in Herzog,<sup>17</sup> which held that a third-party contractor that operated passenger commuter trains on behalf of the regional transit authorities in Dallas-Ft. Worth was a covered rail carrier employer under the RRA and RUIA, because it dispatched the trains of interstate freight rail carriers that shared use of the track owned by the regional transit authorities.<sup>18</sup>

On judicial review, the court placed the case in abeyance to allow the parties to seek the opinion of the Board on whether Rail-Term is a carrier subject to STB jurisdiction.

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<sup>14</sup> Id.

<sup>15</sup> Id. at 6-7. The same functional analysis prompted both the RRB majority and dissent to reach an alternative ruling under sections 1(b) and (d) of the RRA (49 U.S.C. §§ 231(b) and (d)), and sections (1)(d) and (e) of the RUIA (49 U.S.C. §§ 351 (d) and (e)). The RRB held that, even if Rail-Term is not properly a “carrier” under ICCTA, its dispatchers nevertheless are “covered employees” of the carriers whom Rail-Term serves. The RRB explained that, because dispatching is “such an integral part of operating a railroad, dispatching cannot be contracted out to a third party that is outside of the control of the railroad.” See, e.g., B.C.D. 10-33 at 7. This statutory basis does not rely on the definition of a rail carrier under ICCTA for finding coverage under the RRA and RUIA and, as explained above, is not an issue referred by the court. We therefore offer no opinion on the RRB’s alternative holding.

<sup>16</sup> B.C.D. 11-14 at 5-6.

<sup>17</sup> Employer Status Determination—Tri-County Commuter Rail Organization, et al. — Herzog Transit Services, Inc., B.C.D. 09-02 (served Jan. 20, 2009), decision on reconsideration, Employer Status Determination—Trinity Railway Express—Train Dispatching, Herzog Transit Services, Inc., B.C.D. 09-53 (served Oct. 28, 2009), aff’d, Herzog Transit Services, Inc. v. RRB, 624 F.3d 467 (7th Cir. 2010) (Herzog).

<sup>18</sup> B.C.D. 11-14 at 3.

## DISCUSSION AND ANALYSIS

The D.C. Circuit has referred to us the question whether Rail-Term is a rail carrier as defined in 49 U.S.C. § 10102(5) and therefore subject to our jurisdiction under 49 U.S.C. § 10501. If so, then its employees would be subject to the RRA and the RUIA (and presumably various other federal laws governing the activities of rail carriers). In addition, ICCTA federal preemption would protect Rail-Term's dispatching activities from unreasonable regulation by state and local entities.

We have exclusive jurisdiction over "transportation by rail carrier," 49 U.S.C. § 10501(a)(1), that is conducted over any "part of the interstate rail network," 49 U.S.C. § 10501(a)(2)(A). There is no real debate that dispatching falls within the statutory definition of "transportation." 49 U.S.C. §§ 10102(9)(A) & (B). Yet that is not enough to come within our jurisdiction. Rail-Term must be providing this transportation service as a "rail carrier", i.e., as a "person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). Applying that part of the definition has presented this agency on more than one occasion with a more complicated determination, as is the case here.

A common carrier railroad is "a well-understood concept arising out of common law, and it refers to a person or entity that holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation." Am. Orient Express Ry.—Pet. for Declaratory Order, FD 34502, slip op. at 4 (STB served Dec. 29, 2005) (American Orient), *aff'd*, Am. Orient Express Ry. v. STB, 484 F.3d 554 (D.C. Cir. 2007). Rail-Term argues that it is not a rail carrier subject to our jurisdiction because it is not holding itself out to the general public as engaged in the business of transporting freight or passengers in interstate commerce. Rail-Term asserts that there is no holding out because it is simply a "vendor of subcontracted services to carrier railroads which historically handled such functions 'in house.'" <sup>19</sup> As far as Rail-Term is concerned, this should end the inquiry.

As ATDA argued, however, we cannot stop there. Long-standing Supreme Court precedent tells us that we can impute a holding out to the public where, as here, a company performs outsourced rail functions on behalf of railroads, and that we must look at what the entity does, not how its charter might read, in determining whether an entity is a rail carrier. *See United States v. Brooklyn E. Dist. Terminal*, 249 U.S. 296, 303-04 (1919) (terminal company providing switching services for its rail carrier customers held to be a common carrier for purposes of HSA); *United States v. Union Stock Yard & Transit Co.*, 226 U.S. 286, 305 (1912) (stockyard company performing switching services for other rail carriers held to be a common carrier subject to the Interstate Commerce Act); *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 523 (1911) (*SP Terminal*) (terminal company that operated wharves as part of a railway transportation system held to be a rail carrier subject to the Interstate Commerce Act); *United States v. California*, 297 U.S. 175 (1936) (terminal railroad found to be a common carrier subject to the Railroad Safety Appliance Act, one of the laws administered by DOT). That precedent has been followed by the lower courts. *See, e.g., Burnside v. Railserve*, 2012 U.S. Dist. LEXIS

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<sup>19</sup> Pet. for Decl. Order at 10.

152026 (W.D. Ark. 2012); Green v. Long Island R.R., 280 F.3d 224 (2d Cir. 2002); Mahfood v. Cont'l Grain Co., 718 F.2d 779 (5th Cir. 1983); United States v. Queen, 445 F.2d 358 (10th Cir. 1971); Lone Star Steel Co. v. McGee, 380 F.2d 640, 643 (5th Cir. 1967) (steel company that owned a rail carrier held to be a common carrier for purposes of FELA).

Therefore, the bare fact that Rail-Term performs outsourced rail operations under contract with its rail carrier customers does not mean that it necessarily falls outside of our jurisdiction. Because of the integral transportation service Rail-Term provides, this Supreme Court precedent permits the agency to impute to Rail-Term the holding out of its client rail carriers regardless of the contractual arrangement between Rail-Term and those rail carriers. This agency has also followed this principle in prior decisions. In Assoc. of P&C Dock Longshoremen v. The Pitts. & Conneaut, 8 I.C.C.2d 280, 294 (1992) (P&C Dock), the contracting entity argued that it should not be deemed a carrier because it contracted with and held out its services only to the client railroad, and did not “file tariffs with the Commission nor ‘hold out’ transportation service to shippers, but simply contract[ed] with [the carrier] to perform stevedoring-type services at issue,” which the carrier then compensated P&C for on a per-ton basis. 8 I.C.C.2d at 294. This agency’s predecessor ruled that the entity should nevertheless be deemed a common carrier: “As long as the questioned service is part of the total rail common carrier service that is publicly offered,” then the entity providing it for the offering railroad, “whether through common ownership or contract, is ‘deemed’ to hold itself out to the public.”<sup>20</sup>

Although Supreme Court and related precedent thus has extended common carrier status to companies performing integral transportation services under contract to the carriers who, in turn, hold out those transportation services to the public, it has not specifically extended that principle to dispatching services performed by a non-affiliated third-party for the carrier. Rather, these cases generally “involve[d] situations where the actual movement of goods or passengers was carried out by the agent.” Weade v. Dichmann, Wright & Pugh, 337 U.S. 801, 808 (1949). As this agency and its predecessor found in American Orient and P&C, however, a business need not in every instance operate the same as the prototypical rail carrier, publish tariffs, or engage in the full panoply of activities a common carrier might conduct, in order for the business to be considered a carrier under ICCTA.

We conclude that Rail-Term should likewise be deemed a rail carrier. While Rail-Term is not itself physically moving goods or passengers directly, its dispatching services are an essential component of its clients’ holding out of interstate common carrier rail transportation, and, by Rail-Term’s own description, are “required” for provision of common carrier service by

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<sup>20</sup> The ICC further observed that the contracted service was being provided generally to all of the contracting carrier’s customers:

There is also no indication of record, either in the operating agreement or elsewhere, that defendant’s service is restricted to certain classes of [the railroad’s] traffic or particular . . . shippers. P&C Dock’s services, paid for by the [railroad] on a fee basis . . . are thus clearly ‘held out’ to all that engage [the client railroad].”

8 I.C.C.2d at 295.

its customers. As the RRB also pointed out, without an order from a dispatcher, a train does not move and cannot deliver its freight or passengers. See B.C.D. 10-22 at 3. As a result, Rail-Term's dispatchers have control over and represent a key step in the movement of the trains of its rail common carrier customers. Therefore, the RRB correctly found that "dispatching is an inextricable part of the actual motion of trains and thereby is an inextricable part of fulfilling the railroad's common carrier obligation." Id. These dispatching services provided by Rail-Term are plainly embraced within the broader transportation services its clients hold out to the general public, and are no different than the services at issue in the cases cited above.<sup>21</sup>

We recognize that businesses today subcontract out many functions, and we do not suggest that every outsourced rail service should be found to be covered by our jurisdiction and its preemptive effect. However, as the industry evolves to take advantage of greater outsourcing opportunities, we must identify the point at which, even if outsourced, specific transportation functions are integral to the overall unity of a rail operator's common carrier obligations. In its submittal quoted above, Rail-Term precisely highlighted this evolution, citing the trend toward decoupling the on-site presence of essential rail functions, and explaining that these functions will, on a contractual basis, increasingly rest outside of the traditional mold of what might define a "carrier," as more "highly trained personnel" and "many types of specialized expertise required for a technologically sophisticated railroad" are outsourced. In an extreme scenario, carriers could subcontract out every essential rail operation—even those performed by crews operating the trains—and avoid many of the applicable rail laws, by declaring that none of the companies providing what collectively amounts to the totality of the rail operations are in fact rail carriers. Instead, the only company that would be a rail carrier would be the shell company that pays the actual providers of service.

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<sup>21</sup> We are aware that the agency has in the past used the term "ministerial" in referring to dispatching. See, e.g., Am. Train Dispatchers Ass'n v. Chicago & N.W., 360 I.C.C. 457 (1979), aff'd sub nom., Am. Train Dispatchers Ass'n v. I.C.C., 671 F. 2d 580 (D.C. Cir. 1982). In that case, however, the question related to the applicability of 49 U.S.C. § 11343 (now § 11323), as to whether a transfer-of-control approval was needed when the responsibility for existing dispatching functions was transferred from one of the jurisdictional carrier parties to a long-standing, authorized joint trackage rights agreement, to the other licensed carrier that was a party to the existing agreement. In that case, where both licensed carriers performed substantial common carrier functions in connection with the joint trackage operation, which of them conducted dispatching was considered insignificant to the determination of whether approval for the change was required under the statutory provisions for licensing transactions. Here, in contrast, we are being asked to determine whether an unregulated entity becomes subject to our jurisdiction; in such a situation, whether that entity's personnel are performing a function like dispatching can indeed be significant. Cf. United Transp. Union—Ill. Legislative Bd. v. STB, 183 F.3d 606, 613-14 (7th Cir. 1999), aff'g Effingham R.R.—Petition for Declaratory Order—Construction at Effingham, Ill., 2 S.T.B. 606 (1997) (unregulated entity performing services that would not require a license if performed by an existing carrier would become subject to the Board's licensing authority).

*Transloading Services.* Our finding that Rail-Term is a rail carrier is consistent with how the Board addresses transloading services. In those cases, the Board examines the facts to determine whether the transloading company is either controlled by or is an agent of the carrier. If it is, then we find that its services are transportation provided by a rail carrier subject to the Board's jurisdiction under § 10501, and that they are thus entitled to ICCTA federal preemption. Conversely, where we find that it is an independent company operating on its own behalf, not as the agent of or on behalf of the rail carrier, we find that its services are not transportation provided by a rail carrier. Compare Town of Babylon and Pinelawn Cemetery—Pet. for Declaratory Order, FD 35057 (STB served Feb. 1, 2008), reconsideration denied (STB served Sept. 26, 2008); declaratory order granted (STB served Oct. 16, 2009), aff'd, N.Y. & Atl. Ry. Co. v. STB, 635 F.3d 66 (2d Cir. 2011) (transload services provided directly to the general public, and not on behalf of the rail carrier, found outside our jurisdiction and thus subject to local zoning ordinances), with City of Alexandria—Petition for Declaratory Order, FD 35157 (STB served Feb. 17, 2009), aff'd sub nom. Norfolk S. Ry. Co. v. City of Alexandria, 608 F.3d 150 (4th Cir. 2010) (transload services on behalf of the rail carrier found to be subject to our jurisdiction and thus federally preempted).

Rail-Term argues that its circumstances are similar to the facts presented in H&M International Transportation, Inc.—Petition for Declaratory Order, FD 34277 (STB served Nov. 12, 2003) (H&M), where the Board concluded that a company's transload services for shipments moving between rail and truck did not make it a common carrier. In H&M, however, the transload services were performed on H&M's property either before or after the rail line-haul, in order to link rail and truck operations. Transloading services, unlike dispatching, can be performed at the beginning or end of a rail movement by the underlying rail carrier, by the shipper/receiver, or by a third party. Whether such a shipper/receiver or third-party provider is deemed to be providing the services of or on behalf of a rail carrier depends, in part, on how integral the service is to the rail carrier's underlying common carrier services that are being held out to the public. After examining the record in H&M, the Board found that H&M's services were independent of the line-haul carrier's rail business because the obligations of the underlying rail carrier "begin and end at the delivery tracks at the H&M facility, [and] there is no evidence that the movement of cars inside the fence of H&M's . . . facility would be considered an integral part of [the underlying rail carrier's] common carrier service." H&M at 3. H&M is thus factually similar to Town of Babylon, and the Board reached the same determination with respect to each company.

Here, in contrast, it is undisputed that Rail-Term provides these transportation services (dispatching) under contract for the exclusive benefit of its client rail carriers and is not marketing these transportation services directly to the shippers. Rather, the dispatching services are embraced within the interstate common carrier services held out to the public by Rail-Term's clients, without which their common carrier services across their system simply could not be executed. Were Rail-Term providing transloading services instead of dispatching services, the facts would be far more analogous to the City of Alexandria case than to the Town of Babylon case.

State of Maine. Our finding here is also consistent with our treatment of dispatching by public entities under our so-called State of Maine doctrine. In Maine Department of Transportation—Acquisition & Operation Exemption—Maine Central Railroad, 8 I.C.C. 2d 835, 836-37 (1991) (State of Maine), the ICC held that a state’s acquisition of an ownership interest in track, right-of-way, and related physical assets would not constitute the acquisition of a railroad line under 49 U.S.C. § 10901(a)(4), and would not result in the state agency becoming a rail carrier under 49 U.S.C. § 10102(5), provided that the arrangement guaranteed that: (i) the selling freight rail carrier would retain a permanent, exclusive freight rail operating easement, together with the common carrier obligation on the line; and (ii) the terms of the sale would protect the carrier from undue interference with the provision of common carrier freight rail service. See, e.g., Mass. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312, slip op. at 5 (STB served May 3, 2010) (Mass DOT), aff’d sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807, 812-13 (D.C. Cir. 2011). The State of Maine doctrine serves two important public purposes. It assists states and local communities in preserving freight rail service on lines where profitability is marginal, and it promotes the efficient use of existing freight rail corridors for commuter rail transportation, without unduly interfering with continuing common carrier freight rail operations over the transferred line.

Sometimes, a State of Maine case will come to the Board where a public entity is not only acquiring an ownership interest in physical assets, but will also perform joint dispatching of both its own commuter operations and those of the freight rail carrier’s trains, although the freight rail carrier retains the common carrier easement on the line. In those cases, the Board has found that the transaction remains outside of its jurisdiction and that the acquiring entity does not become a common carrier, a holding that has been judicially upheld.<sup>22</sup> In Mass DOT, for example, the Board found that a public agency may assume responsibility for dispatching freight operations, but only as long as the operating procedures are reasonable and do not discriminate against freight service. The Board has also stated that the transfer of dispatching (and track maintenance) responsibilities to a non-carrier in a State of Maine transaction may not “be used for the primary purpose of circumventing the railway labor laws.” Fla. Dep’t of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110, slip op. at 10 (STB served Dec. 15, 2010).<sup>23</sup>

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<sup>22</sup> See City of Dallas, City of Fort Worth and D/FW RAILTRAN—Pet. for Decl. Order (City of Dallas), FD 32406 (ICC served Dec. 30, 1993); Los Angeles Cnty. Transp. Comm’n—Pet. for Exemption—Acquis. from Union Pac. R.R., FD 32374 et al. (STB served July 23, 1996); Metro Reg’l Transit Auth.—Acquis. Exemption—CSX Transp., Inc., FD 33838 (STB served Oct. 10, 2003); and Utah Transit Auth.—Acquis. Exemption—Acquis. from Union Pac. R.R., FD 35008 et al. (STB served July 23, 2007).

<sup>23</sup> The Board has stated that a non-public party seeking to take over dispatching without becoming a rail carrier will have a heightened burden. See San Benito R.R.—Acquis. Exemption—Certain Assets of Union Pac. R.R., FD 35225, slip op. at 5 (STB served June 23, 2011).

Having reviewed our precedent in this area, we hold that a finding that Rail-Term is a carrier can be harmonized with these State of Maine cases. The qualified State of Maine cases that involve dispatching concern a *public* entity whose primary function following the transaction would be to provide commuter rail service, and who also incidentally would be providing a joint rail dispatching function *over the public entity's lines* for a freight rail carrier who retained a freight easement over the lines following the transfer. In such cases, although the public entity would in fact be engaging in dispatching of freight carriers (as is Rail-Term), that would be neither its primary nor sole purpose (unlike Rail-Term). To the contrary, such an arrangement is designed to enable the public entity on the scene to manage its *non-common carrier* business—commuter rail. As a public entity, it does not dispatch freight trains for the sake of a freight carrier, and does not operate solely as an arm of the freight rail's operations. The goal of the dispatching arrangement flowing out of the intervening State of Maine transaction instead is to permit the coexistence of the public carrier and freight carrier, while furthering the State of Maine transaction's underlying public policy goals. As such, while the Board may have discretion to impute a holding out to those public entities in these kinds of cases, it is not required to do so where the joint dispatching is simply incidental to commuter rail operations, and where asserting jurisdiction would undercut the two important public purposes behind the State of Maine doctrine.<sup>24</sup>

Thus, the facts and policy considerations here are quite different from the typical State of Maine case. The freight railroads for which Rail-Term provides dispatch services are railroads where, in each instance, the dispatching is provided exclusively as an extension of, and replacement for, the dispatching that railroad would perform, outside of any other transactions or

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<sup>24</sup> We therefore respectfully disagree with the aspect of the decision of the RRB and the Seventh Circuit in the Herzog case holding that the dispatching company there, whose dispatching effort was on behalf of the State of Maine public entity, was a carrier subject to our jurisdiction. In that case, a state entity was responsible for dispatching a line used for both freight and commuter services, as a follow-on to a State of Maine transaction, as described above. In keeping with the important goals of our State of Maine doctrine, the Board had declined to assert jurisdiction over the municipal authorities and their operator, RAILTRAN, simply because the authorities would be performing incidental freight dispatching services while also dispatching their commuter operations. City of Dallas, et al., 1993 ICC LEXIS 299, at \*10-12 (1993). We recognized, without concern for any consequent jurisdictional significance, that either the authorities or RAILTRAN itself might subcontract out the dispatching functions, stating that, were that to occur: “We find that the Commission need not approve the assumption by RAILTRAN of the authority to dispatch, operate, maintain and repair the Corridor or the selection of a Designee to perform these functions.” Id. at \*10. The RRB and the Seventh Circuit found that, when the state entity did subcontract those dispatching functions to another company, i.e., a “Designee,” that company became a carrier subject to our jurisdiction because of the essential nature of dispatching. We do not agree. The subcontractor's activities were derivative of the dispatching activity taken on by the non-carrier public entity. Hence, the Board believes that the statute and governing Supreme Court precedent provide the Board with the discretion not to adopt such an expansive interpretation of its jurisdiction where there are compelling public goals that would be compromised.

public policy considerations, and its dispatching services are an integral component of the interstate freight operations held out to the public by these freight carriers. Rail-Term's operational and economic incentive is specifically to displace essential in-house operations of its freight rail carrier clients in implementing transportation, rather than as an incidental step in a State of Maine public entity transaction. Unlike under our State of Maine cases, there is no public policy that would be furthered by finding that Rail-Term is not a rail carrier under ICCTA despite its assumption of dispatching services on behalf of its rail carrier clients. To the contrary, finding that Rail-Term is a rail carrier under ICCTA affords the protections of the RRA and RUIA to its employees and affords federal preemption from unreasonably burdensome state and local laws to Rail-Term as well as its carrier clients.

### CONCLUSION

We recognize that Rail-Term is not a typical carrier. But as we found in American Orient, a business need not operate the same as the prototypical rail carrier to be considered a carrier. In these circumstances—and given the essential nature of the outsourced rail operations performed by Rail-Term for the freight railroads in the setting before us—we find that Congress would intend for those services to fall within our jurisdiction and for the employees performing those dispatching functions to be subject to the various federal railroad labor-related laws and safety-related laws. Accordingly, we declare that Rail-Term is a rail carrier performing rail transportation services that are subject to the jurisdiction of the Board.

As a non-typical rail carrier, the various provisions of ICCTA may not apply to it in the same way that they would apply to other carriers. Moreover, we have broad authority to exempt Rail-Term from all or part of ICCTA pursuant to 49 U.S.C. § 10502. *See, e.g., American Orient*, slip. op at 7. While we will not exempt Rail-Term *sua sponte*, the company may petition for an exemption from all or part of ICCTA's provisions that are not necessary to carry out the rail transportation policy or to protect shippers from the abuse of market power.

This action will not significantly affect either the quality of the human environment or the conservation of energy resources.

It is ordered:

1. The petition for a declaratory order is denied for the reasons set forth above.
2. This decision is effective on its service date.
3. Rail-Term is directed to file a copy of this decision with the D.C. Circuit in Rail-Term Corp. v. R.R. Ret. Bd., No. 11-1093, within 30 days of the effective date of this decision, and is directed to inform the Board that it has done so by letter filed in this docket and served on the parties to this case.

By the Board, Chairman Elliott, Vice Chairman Begeman, and Commissioner Mulvey.  
Vice Chairman Begeman dissented with a separate expression.

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VICE CHAIRMAN BEGEMAN, dissenting:

I must dissent from the Board's decision.

Two years ago, the D.C. Circuit referred a specific, limited question for our analysis – is Rail-Term a *rail carrier*? One would think that would be a determination for the Board to make without delay considering it and its predecessor agency, the Interstate Commerce Commission (ICC), have had jurisdiction over our nation's rail industry for well over a century. After all, the key facts of this case are not in dispute.

Rail-Term is a small privately-owned company that provides “outsourced” dispatching services to a number of short line and regional railroads. Rail-Term owns a dispatching computer software system and provides dispatching services to its railroad clients remotely from its office in Rutland, Vermont, with the help of its seven employees. Rail-Term does not have track, locomotives, or freight cars and crews, and it does not otherwise have access to or operate a line of railroad. Nor does Rail Term hold out to the general public that it provides interstate rail transportation for persons or property. Rail-Term provides its dispatching services solely to its railroad clients. It is Rail-Term's railroad clients—the rail carriers—that provide interstate rail transportation services for shippers, and it is those rail carriers that are licensed entities subject to the Board's jurisdiction.

The Board has jurisdiction under Part A of Subtitle IV of Title 49 over transportation by “rail carrier” when such transportation is “part of the interstate rail network.” 49 U.S.C. §§ 10501(a)(1)(A), (a)(2)(A). A “rail carrier” is a “person providing *common carrier* railroad transportation for compensation . . . .” 49 U.S.C. § 10102(5) (emphasis added). Although the term “common carrier” is not defined in the statute, the Board has stated that a common carrier is one that “holds itself out to the general public as engaged in the business of transporting persons or property from place to place for compensation.” Am. Orient Express Ry. v. STB, 484 F.3d 554, 557 (D.C. Cir. 2007); Wis. Cent. Ltd. v. STB, 112 F.3d 881, 884 (7th Cir. 1997). And, importantly, a rail carrier has a common carrier obligation to provide service upon reasonable request. 49 U.S.C. § 11101.

In my judgment, the Board's decision finding Rail-Term to be a rail carrier is not supported by law or logic. Rail-Term has not held out to the general public that it provides rail transportation of persons or property and it has no means by which to do so. The majority even emphasizes this fact in its decision stating that Rail-Term “is not marketing these transportation services directly to shippers.” How can Rail-Term be expected to conduct safe and reliable rail transportation service when all it has is a computer software system, but no locomotives or rolling stock or crews, and no access to a rail line? How does the Board envision that Rail-Term could meet its common carrier obligation to provide service upon reasonable request?

I do not dispute that dispatching is a critical element in the overall provision of rail transportation. Of course it is. But that one element has not, to date, in and of itself, been the determinative factor in whether an entity is a rail carrier.

Not only is today's Board decision not supported by the statute, it also runs counter to agency precedent, including the State of Maine doctrine. Time and again, the Board has held that an entity is *not* a rail carrier when it acquires an ownership interest in track, right-of-way, and related physical assets and even maintains and dispatches services for freight operations, provided that the terms of the transaction at issue meet certain criteria that generally ensures the freight rail operator can provide service without undue interference. See Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312 slip op. at 5 (STB served May 3, 2010), aff'd sub nom. Bhd. of R.R. Signalmen v. STB, 638 F.3d 807, 812-13 (D.C. Cir. 2011). As recently as March of this year, while the present case was also pending, the Board concluded that placing dispatching and maintenance in the hands of the acquiring entity did not constitute control by the acquiring entity, and thus it was not a rail carrier, N.J. Transit Corp.—Acquis. Exempt.—Norfolk S. Ry., FD 35638 (STB served Mar. 27, 2013), and that doing so is not a circumvention of railway labor laws. See Mich. Dep't of Transp.—Acquis. Exemption—Certain Assets of Norfolk S. Ry., FD 35606 (STB served May 8, 2012).<sup>1</sup>

The majority's decision here stating that Rail-Term's dispatchers have "control" is a sudden about face. The Board previously has said that "dispatching control has less importance in its own right than it has as a means of enforcing the service priorities in the operating agreement." See, e.g., Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transport., FD 35312, slip op. at 10 (STB served May 3, 2010); Metro Reg'l Transit Auth.—Acquis. Exemption—CSX Transp., Inc., FD 33838, slip op at 2 (STB served Oct. 10, 2003); Los Angeles City Transp. Comm'n—Pet. for Exemption—Acquis. from Union Pac. R.R., FD 32374, slip op at 3 (STB served July 23, 1996). And the ICC has held that dispatching is "ministerial" in nature and does not constitute "control" over a railroad line under the Interstate Commerce Act. Am. Train Dispatchers Ass'n v. Chicago & Nw. Transp. Co., 360 I.C.C. 457, 461-62 (1979), aff'd sub nom. Am. Train Dispatchers Ass'n v. ICC, 671 F.2d 580 (D.C. Cir. 1982).<sup>2</sup> To now suggest, as the majority does here, that an outsourced dispatching service has "control" over a rail carrier is in direct contravention to the very essence the of State of Maine doctrine – that the acquiring non-carrier cannot have control. Bhd. of R.R. Signalmen v. S.T.B., 638 F.3d 807

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<sup>1</sup> There are numerous other examples wherein the Board has allowed dispatching, among other things, to be placed in the hands of the acquiring non-carrier without it becoming a rail carrier. See, e.g., Fla. Dep't of Transp. —Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110 (STB served June 22, 2011); Fla. Dep't of Transp. —Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110 (STB served Dec. 15, 2010); Md. Transit Admin.—Pet. for Dec. Order, FD 34975 (STB served Sep. 19, 2008); Utah Transit Auth.—Acquis. Exemption—Union Pac. R.R., FD 35002 (STB served July 23, 2007); Metro Reg'l Transit Auth.—Acquis. Exemption—CSX Transp., Inc., FD 33838 (STB served Oct. 10, 2003).

<sup>2</sup> The majority's reliance on Effingham R.R. —Petition for Declaratory Order—Construction at Effingham, IL, 2 S.T.B. 606 (1997), aff'd sub nom. United Transp. Union—Ill. Legis. Bd. v. STB, 183 F.3d 606 (7th Cir. 1999), to remediate its characterization of dispatching up until now is misplaced. Effingham R.R. has no relevance to the issue before us except to further illustrate the vast difference between a dispatching service and a rail carrier that provides switching services over its own rail line that it constructed.

(D.C. Cir. 2011), aff'g Mass. Dep't of Transp.—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35312 (STB served May 3, 2010).

The majority's attempt to distinguish the State of Maine line of cases as involving only public entities, which Rail-Term is not, rings disingenuous. Indeed, the ICC and STB have found that the State of Maine doctrine can also apply to acquisitions involving private entities. See, e.g., Midtown TDR Ventures—Acquis. Exemption—Am. Premier Underwriters, FD 34953 (STB served Feb. 12, 2008); Mo. River Bridge Co.—Acquis. Exemption—Certain Assets of Chicago, Cent. & Pac. R.R., FD 32384 (ICC served Mar. 3, 1994). And in San Benito R.R., this Board not only acknowledged that the State of Maine doctrine did not categorically preclude private entities who, among other things, dispatch, it specifically stated that the private entity was welcome to renew its motion in the future if its business circumstances changed. San Benito R.R.—Acquis. Exemption—Certain Assets of Union Pacific R.R., FD 35225 (STB served Jun. 23, 2011).<sup>3</sup> In a footnote, the majority says San Benito R.R. requires a “heightened burden” for private parties, but in fact, the test we applied there – whether there is a legitimate business justification for placing dispatching and maintenance in the hands of the acquiring non-carrier – is the *same test* we apply to public entities. See San Benito R.R., slip op. at 3 (“We will apply the same criteria here.”); Fla. DOT—Acquis. Exemption—Certain Assets of CSX Transp., Inc., FD 35110 (STB served Dec. 15, 2010); see also Mich. Dep't of Transp., slip op. at 5 (citing San Benito R.R. for the same proposition).

Further, the majority's attempt to distinguish this decision from the Board's findings about transloading operations is not on point and in fact, appears to miss it entirely. At issue in those proceedings was whether the Board had jurisdiction over certain transloading operations, thus preempting local zoning and regulatory authority. But the Board was not asked, nor did it conclude, that the *transloading operators* were “rail carriers.” In City of Alexandria—Petition for Declaratory Order, FD 35157 (STB served Feb. 17, 2009), for example, the Board was asked whether certain transloading operations constituted transportation by rail carrier and, therefore, was shielded from most state and local laws by the preemption provision in 49 U.S.C. § 10501(b). To qualify for Federal preemption under § 10501(b), the activities at issue must be “transportation,” and must be performed by, or under the auspices of, a “rail carrier.” There, the Board concluded that transloading met the criteria for preemption, not because the transloading operator was a rail carrier, but because the transloading services at issue were operated under the auspices of the rail carrier, and were part of the carrier's rail transportation service.

While today's decision notes that Rail-Term could be somewhat analogous to City of Alexandria, I think it is spot on. Rail-Term is providing dispatching services under the auspices of its rail carrier clients, but is not itself a rail carrier. That is another reason why it is hard to understand the Board's decision here. The majority has failed to explain *why* and *how* an independent dispatching company should be regulated as a rail carrier, when it has allowed many other entities to perform a host of rail-related activities, including dispatching, without finding

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<sup>3</sup> There, the Board found that San Benito had not offered a legitimate business justification for placing dispatching and maintenance in the non-carrier's hands because the enterprise that the acquisition was to serve had become defunct.

those entities rail carriers. I must again question, how will this newly designated rail carrier be able to provide freight rail service upon reasonable request? Will Rail-Term also be subject to unreasonable practice and rate cases?

Even though the majority has worked to squeeze Rail-Term into the rail carrier peg, the Board recognizes that Rail-Term does not fit within our regulatory scheme and suggests that it will entertain petitions to exempt Rail-Term from all or part of ICCTA's provisions. But if that is the majority's intent, to ultimately absolve Rail-Term from rail regulation because, after all, Rail-Term cannot realistically fulfill the same requirements under the law as genuine rail carriers must, what *public* interest is the Board serving by claiming regulatory jurisdiction on the one hand, only to suggest Rail-Term jump through hoops, including the payment of regulatory filing fees that could be thousands of dollars, to eventually get out of regulatory reach? Rail-Term, and entities like it, as rail carriers with federal preemption, may ultimately be regulated by no one.

Whether the Railroad Retirement Board ultimately finds that Rail-Term is a covered employer under a different legal prong, or that its workers are covered employees for railroad retirement purposes, is not for us to decide, and my dissent does not preclude such a result. But in my very strong view, Rail-Term is not a rail carrier.